FILE COPY

No. 52

Office-Supreme Court, U.S.
FILED
FEB 8 1960
JAMES R. BROWNING, Clerk

In the Supreme Court
of the United States

OCTOBER TERM, 1958

HARRY A. HAHN,

Petitioner,

v.

ROSS ISLAND SAND & GRAVEL CO.,
a corporation,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon.

RESPONDENT'S PETITION FOR REHEARING OF DECISION

DWIGHT L. SCHWAB,
712 Executive Bldg.,
Portland, Oregon.
HERBERT C. HARDY,
1220 Equitable Bldg.,
Portland, Oregon.
Attorneys for Petitioner.
ROBERT T. MAUTZ,
ARNO H. DENECKE,
10th Floor,
Board of Trade Bldg.,
Portland 4, Oregon.
Attorneys for Respondent.

BRIEF & CLIENT SERVICE CO., PORTLAND, ORE.

In the Supreme Court
of the United States

OCTOBER TERM, 1958

HARRY A. HAHN,

Petitioner,

v.

ROSS ISLAND SAND & GRAVEL CO.,
a corporation,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon.

RESPONDENT'S PETITION FOR REHEARING OF DECISION

The respondent respectfully submits that this Court erred in its decision in this case, first, in defining the boundary of the "twilight zone" and, second, in extending the "twilight zone" beyond workmen's compensation proceedings, and that these errors will add to the utter confusion now existent in state and federal courts and among counsel for injured workmen, employers and insurance carriers and, therefore, this Court should set aside its decision and grant a rehearing.

ARGUMENT

I.

This Court erred in defining the boundaries of the "twilight zone."

The opinion of this Court states that the "twilight zone" is that area in which "a workers injury occurred in an operation which, although maritime in nature, was so 'local' as to allow state compensation laws validly to apply under the limits of *Southern Pacific Co. vs. Jensen*, 244 U.S. 205." *Davis vs. Department of Labor*, 317 U.S. 249, is cited for this proposition. A paraphrasing of the above quotation is,—if the injury is maritime but local, state compensation benefits can be secured. There is no question, that is accepted as the law, but that law was announced in 1921 in *Western Fuel Co. vs. Garcia*, 257 U.S. 233, 42 S. Ct. 89, and in 1922 in *Grant-Smith-Porter vs. Rohde*, 257 U.S. 549, 42 S. Ct. 157, seven and six years before the Longshoremen's & Harbor Worker's Act was enacted. If maritime but local was the thesis of *Davis*, then Mrs. Davis could have been awarded Washington State compensation on the basis of *Grant-Smith-Porter Co.*, and the balance of the Court's decision in *Davis* must be interpreted as meaning that for a maritime but local injury, one can obtain federal compensation as well as state compensation.

Pursuant to this language in the present decision the old question is again, whether "a worker's injury occurred in an operation which, although maritime in nature was so 'local' as to allow state compensation laws validly

to apply under the limits of *Southern Pacific vs. Jensen* (citation)." Must the old search be renewed? Is it maritime but local? If it is one may obtain either federal or state compensation. If it is only maritime and not local, only federal compensation can be secured. Are cases prior to *Davis* still the criteria for maritime but local? Is there a new test? Must the boundary again be punched out, injury by injury, case by case?

The Court here stated:

> "It seems plain enough that petitioner's injury occurred in the 'twilight zone'."

Reading this in connection with the Court's definition of "twilight zone", it is apparently plain to the Court that this injury was maritime but local. What makes it "plain"? At the time of his injury, petitioner was on a barge loading interstate cargo. Is this an example of an operation that is plainly local? This was not as "plain" to the Oregon Court in *Martinson vs. State Industrial Accident Commission*, 154 Ore. 423, 60 P.2d 972 (1936); or the Court of Appeals for the Ninth Circuit in *Chappell vs. C. D. Johnson Lumber Corp.*, 216 F.2d 873 (1954). Both of these Courts thought that loading a barge was a purely maritime matter and not one of local concern.

There must be some substantial reason why petitioner's injury here is plainly a matter of local concern, but on the other hand, a janitor riding in a motor boat is engaged in a "clearly maritime activity"; *Parker vs. Motor Boat Sales*, 314 U.S. 244, 62 S. Ct. 221. The difference cannot be because of the general and usual em-

ployment of the two employees. The Court in *Parker* held that the general or usual employment was immaterial; it was what the employee was doing at the time of injury that counted. However, even if that is no longer the test, the petitioner's general and usual employment here was all on navigable water; on a barge. His employment was propelling or moving a barge. Under this Court's decisions in *Grimes vs. Raymond Concrete Pile Co.,* 78 S. Ct. 687, and *Senko vs. LaCross Dredging Co.,* 352 U.S. 70, 77 S. Ct. 415, it would appear, had Hahn chosen, that Hahn could have gone to the jury under the Jones Act on the premise that he was a member of the crew of a vessel.

If it is so "plain" that petitioner's injury occurred in an operation maritime but local, this Court must have some track marked through the growing labyrinth of admiralty versus local growth, the blazes for which will guide the unknowing toward the light. It would be of inestimable assistance to have a few of the guide posts revealed.

II.

This Court erred in holding the "twilight zone" applicable to a damage action.

This Court stated:

> "Since this case is within the 'twilight zone', it follows from what we held in *Davis* that nothing in the Longshoremen's Act or the United States Constitution prevents recovery."

With all due respect, it appears to the respondent that this Court is thereby stating,—the illogical premise of *Davis* must be logically followed.

Congress in the longshoremen's Act provided that compensation under the Act was payable:

> "Only * * * if recovery * * * through workmen's compensation proceedings may not validly be provided by state law."

It appears quite obvious from this language that Congress intended mutually exclusive remedies. However, this Court in *Davis*, for the stated purpose of correcting uncertainty in the field of workmen's compensation, decided contrary to the statute, and created concurrent remedies. The Court in *Davis* thought necessity justified an illogical decision contrary to a Congressional Act. Here the necessity is absent. A certain compensation remedy is and always was available to Harry Hahn. Neither experience, necessity nor logic can support a further departure from the clear intent of Congress.

It is respectfully submitted that this Court is in error and that such error will compound the confusion now existent unless the decision in this case is set aside and this petition for rehearing granted.

Respectfully submitted,

ROBERT MAUTZ,
ARNO H. DENECKE,
10th Floor, Board of Trade Bldg.,
Portland 4, Oregon,
Attorneys for Respondent.

STATE OF OREGON)
) ss.
County of Multnomah)

I, Arno H. Denecke, of attorneys for Petitioner do hereby certify that the foregoing petition for rehearing is presented in good faith and is not interposed for the purposes of delay.

ARNO H. DENECKE

SUPREME COURT OF THE UNITED STATES

No. 52.—October Term, 1958.

Harry A. Hahn, Petitioner, v. Ross Island Sand & Gravel Co., a Corporation.	On Writ of Certiorari to the Supreme Court of Oregon.

[January 12, 1959.]

Per Curiam.

By its terms, the Longshoremen's and Harbor Workers' Compensation Act does not apply "if recovery for the disability or death through workmen's compensation proceedings *may . . . validly be provided by State law.*" § 3, 44 Stat. 1426, 33 U. S. C. § 903 (a) (emphasis supplied). In *Davis* v. *Department of Labor*, 317 U. S. 249, we recognized that in some cases it was impossible to predict in advance of trial whether a worker's injury occurred in an operation which, although maritime in nature, was so "local" as to allow state compensation laws validly to apply under the limitations of *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205. As to cases within this "twilight zone," *Davis*, in effect, gave an injured waterfront employee an election to recover compensation under either the Longshoremen's Act or the Workmen's Compensation Law of the State in which the injury occurred. It seems plain enough that petitioner's injury occurred in the "twilight zone," and that recovery for it "through workmen's compensation proceedings," could have been, and in fact was, validly "provided by State law"—the Oregon Workmen's Compensation Act. Ore. Rev. Stat. §§ 656.002–656.990. Therefore, the Longshoremen's Act did not bar petitioner's claim under state law. But since his employer had elected to reject them the automatic compensation provisions of the Oregon Workmen's Com-

pensation Act did not apply to the claim. Section 656.024 of that law provides, however, that when an employer has elected to reject the Act's automatic compensation provisions his injured employee may maintain in the courts a negligence action for damages. Of course, the employee could not do this if the case were not within the "twilight zone," for then the Longshoremen's Act would provide the exclusive remedy. Since this case is within the "twilight zone," it follows from what we held in *Davis* that nothing in the Longshoremen's Act or the United States Constitution prevents recovery.

The judgment is reversed and the cause is remanded to the Supreme Court of Oregon for proceedings not inconsistent with this opinion.

THE CHIEF JUSTICE and MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 52.—October Term, 1958.

Harry A. Hahn, Petitioner,
v.
Ross Island Sand & Gravel Co., a Corporation.

On Writ of Certiorari to the Supreme Court of Oregon.

[January 12, 1959.]

Mr. Justice Stewart, whom Mr. Justice Harlan joins, dissenting.

This case poses a difficult and important issue of first impression. The Court decides it, I think, incorrectly.

The petitioner was injured while working on a barge in navigable waters within the State of Oregon. The respondent employer had secured payment of compensation under the Longshoremen's and Harbor Workers Compensation Act, 33 U. S. C. § 901 *et seq.*, but had elected not to be covered by the Oregon Workmen's Compensation Law, Ore. Rev. Stat. § 656.002 *et seq.* Compensation benefits under the federal statute were clearly available at all times to the petitioner. Instead of accepting these benefits, however, he brought an action for personal injuries in an Oregon state court, the Oregon statute permitting such an action against an employer not participating in the state workmen's compensation plan.[1]

The trial court entered judgment for the employer, notwithstanding a jury award in the petitioner's favor, and the judgment was affirmed by the Oregon Supreme

[1] The employer in such a case is deprived of the traditional common-law defenses. Ore. Rev. Stat. § 656.024.

Court, which held that the petitioner's sole remedy was under the federal statute. 66 Oregon Advance Sheets 117, 320 P. 2d 668. It is that decision which is today reversed.

The creation in *Davis* v. *Department of Labor* of a "twilight zone" was a practical solution to a practical problem, a problem stemming from *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, and one which 25 years of post-*Jensen* history had failed to solve. The problem was how to assure to injured waterfront employees the simple, prompt, and certain protection of workmen's compensation which Congress had clearly intended to give in enacting the federal statute. See 317 U. S., at 254. The *Davis* decision in effect told the injured employee that in a doubtful case he would be assured of workmen's compensation whether he proceeded under a state workmen's compensation act or the federal statute. See *Moores's Case*, 323 Mass. 162, 80 N. E. 2d 478, aff'd *per curiam, sub nom. Bethlehem Steel Co.* v. *Moores*, 335 U. S. 874.

Even accepting the premise that the circumstances surrounding Hahn's accident brought it within the twilight zone, no one had supposed until today that either *Davis* or the federal statute allowed an employee to spurn federal compensation and submit his claim to a state court jury.[2] *Chappell* v. *C. D. Johnson Lumber Corp.*, 112 F. Supp. 625, reversed on other grounds, 216 F. 2d 873.

---

[2] The pertinent provision of 33 U. S. C. § 903 (a) is as follows: "(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death *through workmen's compensation proceedings* may not validly be provided by State law." (Emphasis added.)

In the interest of a clear legislative purpose to provide the certainty and security of workmen's compensation, the "illogic" of a twilight zone was permitted.[3] Such illogic should not be utilized to frustrate that very purpose. I would affirm the judgment.

---

[3] The twilight zone and its background have been much criticized and discussed. For summaries, see Gilmore and Black, The Law of Admiralty (1957), § 6-48; 2 Larson, The Law of Workmen's Compensation (1952), § 89.00 *et seq.*; Rodes, Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone, 68 Harv. L. Rev. 637 (1955).